



Case Number:	Civil Application 10 of 2014
Date Delivered:	06 May 2014
Case Class:	Civil
Court:	Supreme Court of Kenya
Case Action:	Ruling
Judge:	Jackton Boma Ojwang, Smokin Charles Wanjala
Citation:	Fredrick Otieno Outa v Jared Odoyo Okello & 3 others [2014] eKLR
Advocates:	Mr Wasuna for the Applicant. Mr Issa Mansour & Mr Odeny for the 1st Respondent. Mr Mukele for the 2nd & 3rd Respondents.
Case Summary:	<p style="text-align: center;"><b>The jurisdiction of the Supreme Court to determine questions on the interpretation and application of the Constitution</b></p> <p style="text-align: center;"><b>Fredrick Otieno Outa v Jared Odoyo Okello &amp; 3 others</b></p> <p style="text-align: center;"><b>Civil Application No 10 of 2014</b></p> <p style="text-align: center;"><b>Supreme Court at Nairobi</b></p> <p style="text-align: center;"><b>J B Ojwang &amp; S C Wanjala, SCJJ</b></p> <p style="text-align: center;"><b>May 6, 2014</b></p> <p style="text-align: center;"><b>Reported by Beryl A Ikamari &amp; Karen Mwende</b></p> <p><b>Brief facts</b></p> <p>In the context of an intended appeal against a Court of Appeal decision to nullify the election results for the Member of the National Assembly for Nyando Constituency, the Applicant sought</p>

orders, at the Supreme Court, for stay of execution of the orders of the Court of Appeal. The intended appeal was to be lodged without leave of the Court of Appeal as the Applicant sought to rely on the right to appeal to the Supreme Court, without leave, where the intended appeal raised questions on the interpretation and application of the Constitution.

The Applicant elaborated that the intended appeal would raise questions on the interpretation of the Constitution and that it was necessary and in the public interest for the orders of stay of execution to be granted as the appeal would otherwise be rendered nugatory. The Applicant included issues such as the interpretation of the term "public officer," under the provisions of article 260 of the Constitution of Kenya 2010, the jurisdiction of the Court of Appeal to determine questions of law and to serve as an election court and on the nature of the offence of bribery, as issues that the intended appeal would raise.

#### **Issues**

1. Whether the Supreme Court had the jurisdiction to hear the appeal on grounds that the appeal raised questions on the interpretation and application of the Constitution.
2. Whether, in the circumstances of the case, a stay of execution could be granted.

***Jurisdiction***-*appellate jurisdiction-jurisdiction of the Supreme Court-jurisdiction of the Supreme Court to hear questions on the interpretation and application of the Constitution in the context of an election petition-Constitution of Kenya 2010, articles 81, 86, & 163(4).*

***Civil Practice & Procedure***-*stay of execution-the grant of a stay of execution at the Supreme Court-conditions under which the Supreme Court would grant a stay of execution.*

#### **Held**

1. Under article 163(4)(a) of the Constitution

of Kenya 2010, an appeal to the Supreme Court would lie as of right where the intended appeal raised questions on the interpretation and application of the Constitution. While the Elections Act, No 24 of 2011 and the Regulations thereunder were normative derivatives of article 81 & 86 of the Constitution of Kenya 2010, not every election petition would be appealable under the provisions of article 163(4)(a) of the Constitution. (*Gatiarau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Application No 5 of 2014).

2. The appeal raised an issue concerning the alleged commission of the election offence of bribery. The commission of an offence, by vitiating the integrity of an election, would go to the heart of the question as to whether an election was free and fair, as provided for under article 81(e) of the Constitution of Kenya 2010.
3. In the context of an intended appeal at the Supreme Court, a stay of execution would be granted under the following conditions: -
  - a. the appeal or intended appeal was arguable and not frivolous;
  - b. unless the order of stay sought was granted, the appeal or intended appeal, were it eventually to succeed, would be rendered nugatory; and,
  - c. it was in the public interest that the order of stay be granted.
4. The appeal raised issues which were *prima facie* arguable and the questions it raised had constitutional underpinnings. The issues raised in the Petition of Appeal covered the following matters: -
  - a. There had been allegations that public officers had campaigned for the Applicant and questions were raised as to whether the Court of Appeal had properly defined the category of persons that were public officers. In particular, the Court of Appeal's adopted interpretation of a public officer under article 260 of the Constitution of Kenya 2010 and section 2 of the Public Officer Ethics Act (Cap 183) was

questioned.

- b. There were allegations of bribery raised and the applicant questioned whether the disbursement of funds by the Constituency Development Fund Committee or the making of election promises could amount to bribery. The applicant also raised questions on whether a bribery offence was sufficiently proved where the alleged beneficiary of bribes was an amorphous body such as a crowd which was not clearly identified.
  - c. The issue on whether the Court of Appeal had exceeded its jurisdiction as provided in article 164(3) of the Constitution of Kenya 2010 and section 85A of the Elections Act, No 24 of 2011, by delving into issues of fact as opposed to issues of law.
  - d. The issue on whether the Court of Appeal was an Election Court capable of issuing a certificate and report pursuant to sections 86(1) and 87(1) of the Elections Act, No 24 of 2011.
5. As the Supreme Court's decision could lead to the overturning of the decision on the nullification of the election results, it would be judicious to issue an order of stay of execution in order to preserve the substratum of the appeal.

*Application allowed*

### **Cases**

#### ***East Africa***

1. *Attorney-General v Marakaru* [1960] EA - (Mentioned)
2. *Board of Governors, Moi High School Kabarak & Another v Malcolm Bell* Petition Nos 6 and 7 of 2013 – (Mentioned)
3. *Munya ,Gatirau Peter v Dickson Kithinji & 2 others* Application No 5 of 2014 – (Followed)

### **Statutes**

#### ***East Africa***

1. Court of Appeal rules (cap 9) – In general
2. Civil Procedure Act (cap 21) – In general
3. Constitution of Kenya,2010 articles 2, 10, 12,

	24, 25, 27, 33(1); 38; 50(1); 81(e); 86; 87; 88; 105;159(2)(d); 163 (4) (a); 164; 259;260-(Interpreted) 4. Elections Act,2011 (Act No 24 of 2011) sections 64,76,86(1);87(1)(2);85A - (Interpreted) 5. Public Officer Ethics Act ,2003 (Act No 4 of 2003) sections 2, 16 - (Interpreted) 6. Supreme Court Act, 2011 (Act No 7 of 2011) sections 15, 16,21,24 - (Interpreted) 7. Supreme Court Rules,2012 (Act No 7 of 2011 Sub Leg ) rules 21 ,23 ,26 – (Interpreted)
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Ojwang & Wanjala SCJJ)*

**CIVIL APPLICATION NO. 10 OF 2014**

**-BETWEEN-**

**FREDRICK OTIENO OUTA .....APPLICANT**

**-AND-**

**JARED ODOYO OKELLO.....RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....RESPONDENT**

**RETURNING OFFICER, NYANDO**

**CONSTITUENCY – DAVID MBUI.....RESPONDENT**

**ODM PARTY.....RESPONDENT**

*In the matter of Orders for stay of execution of appellate Court Orders and in the matter of an election petition appeal on the election of the Member of Parliament for Nyando Constituency.*

**R U L I N G**

**A. INTRODUCTION**

**[1]** This is an application by way of Notice of Motion under certificate of urgency seeking orders that:

a. *there be stay of execution of the whole judgment/orders of the Court of Appeal sitting at Kisumu (Waki, Maraga & Ole Kantai JJA) dated 28<sup>th</sup> March 2014, in Kisumu Civil Appeal No. 46 of 2013, pending the hearing and determination of the appeal;*

b. *the 2<sup>nd</sup> respondent herein be stopped from certifying the seat of Member of Parliament for Nyando Constituency vacant pending the hearing and determination of the appeal;*

c. *the Speaker of the National Assembly of the Republic of Kenya or any other person for that matter, be stopped from issuing writs to the 2<sup>nd</sup> respondent, pending the hearing and determination of the appeal;*

d. *the 2<sup>nd</sup> respondent be stopped from announcing and/or conducting elections for Nyando Constituency, pending the hearing and determination of the appeal; and*

e. *the costs of, and incidental to the application abide the result of the appeal.*

[2] The applicant has filed an appeal seeking to set aside the whole judgment of the Court of Appeal in *Civil Appeal No. 46 of 2013* at Kisumu, dated 28<sup>th</sup> March, 2014.

[3] On 7<sup>th</sup> April, 2014, Wanjala SCJ, having heard counsel for the applicant, certified the application as urgent and issued *ex parte* stay orders maintaining the status quo. He directed the applicant to effect service upon all the respondents. He ordered the parties to appear before a two-Judge Bench of the Court for *inter partes* hearing on 15<sup>th</sup> April, 2014.

[4] The applicant, thereafter, filed his skeleton submissions on 14<sup>th</sup> April 2014, while the 1<sup>st</sup> to the 4<sup>th</sup> respondents filed replying affidavits between the 11<sup>th</sup> and 14<sup>th</sup> April, 2014. The 1<sup>st</sup> respondent contested the jurisdiction of this Court, contending that the matter herein was not one of constitutional interpretation or application, and thus did not fall to this Court by the terms of Article 163 (4) (a) of the Constitution.

## **B. BACKGROUND**

[5] Following the General Election of 4<sup>th</sup> March 2013, the applicant was declared the duly-elected Member of Parliament for Nyando Constituency by the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent filed, in the High Court at Kisumu, an election petition dated 2<sup>nd</sup> April 2013, challenging the election on various grounds, including irregularities and election malpractices.

[6] The petition was heard and determined by the trial Court (Muchelule J.), and final orders issued as follows:

i. *the petitioner (1<sup>st</sup> respondent herein) had failed to establish that there were substantial irregularities of such a nature as negated the expression of the will of the electorate in Nyando constituency;*

ii. *the elections conducted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were substantially in accordance with the law; and*

iii. *as a result of (i) and (ii) above, the applicant was duly elected as the Member of Parliament for Nyando Constituency;*

iv. *the petitioner was to pay costs amounting to KES 2,000,000/00.*

[7] The 1<sup>st</sup> respondent herein was aggrieved by the judgment of the trial Court and appealed against it, in Kisumu Civil Appeal No. 46 of 2013. The appeal was pursued on two main grounds: first, that the High Court Judge was biased against the 1<sup>st</sup> respondent; and secondly, it was alleged that the election of the applicant did not meet constitutional standards. The main limb of this argument stemmed from allegations of bribery against the applicant, and of public officers having campaigned for the applicant, in breach of the law.

[8] The Court of Appeal determined that the applicant was not validly elected as Member of Parliament for Nyando Constituency. Their judgment was based on two principal grounds: that the applicant had committed the offence of bribery, contrary to Section 64 of the Elections Act (Cap 7, Laws of Kenya); and that the applicant had public officers campaigning for him contrary to Section 16 of the Public Officer Ethics Act (Cap 83, Laws of Kenya). The Court held that, the alleged situations of fact had substantially negated the will of the people. However, the allegations of bias were found not to have been proven, with the learned Judges holding that the trial Judge's accepting of the applicant's witnesses' testimonies, and not finding the 1<sup>st</sup> respondent's witnesses credible, was not by and of itself, proof of bias. The applicant was ordered to pay costs of the 1<sup>st</sup> respondent in the sum of KES 2,000,000/00 for the proceedings at the trial court and KES 1,000,000/00 for the appeal.

[9] An *inter partes* hearing was held on 15th April, 2014 to canvass this application. On that occasion, the interim orders were extended pending this determination.

## **C. THE CASES OF THE PARTIES**

### **(i) *The Applicant***

[10] The applicant contended that this Court had jurisdiction to hear the intended appeal. Learned counsel, Mr. Wasuna relied on Article 163 (4) (a) of the Constitution, contending that he was approaching the Court as a matter of right. He pointed to the opening paragraphs of the Court of Appeal's judgment, to show that in the understanding of the learned Judges of that Court, they were to resolve the question whether the election of the Member of the National Assembly for Nyando Constituency met constitutional thresholds. Furthermore, the applicant was seeking the Court's



interpretation of Articles 2, 10, 12, 24, 25, 27, 33(1), 38, 50, 88, 105, 163 and 259 of the Constitution, as well as an interpretation of the Court of Appeal's jurisdiction on electoral disputes, as provided for under Article 87, and an interpretation of Article 260 of the Constitution *vis-à-vis* Sections 2 and 16 of the Public Officer Ethics Act.

[11] Learned counsel relied on this Court's decision in the case of ***Gatirau Peter Munya v. Dickson Kithinji & 2 Others***, SC Application No. 5 of 2014 on the question of this Court's jurisdiction. The applicant was convinced that this was a matter of constitutional interpretation and application, and that under Sections 15 and 16 of the Supreme Court Act, 2011 he did not need to seek leave from the Court of Appeal, and was entitled to come to this Court directly.

[12] The applicant also relied on the case of ***Board of Governors, Moi High School Kabarak & Another v. Malcolm Bell***, SC Petition Nos. 6 and 7 of 2013 as authority for the Court, by virtue of its inherent power, granting interlocutory orders. The applicant further cited Sections 21 and 24 of the Supreme Court Act, 2011 as provisions empowering the Court to issue interlocutory orders. Relying on the ***Bell v Moi*** decision, it was the applicant's submission that the only way to have his day in Court was for the Court to preserve the subject-matter, pending the determination of the petition.

[13] The applicant enumerated the three requirements established in the ***Munya*** case, for obtaining interlocutory orders in such a matter: that there was an *arguable case*, that the appeal would be *rendered nugatory without the orders of stay*, and that the grant of the orders of stay was in the *public interest*. On whether or not there is an arguable appeal, the applicant answered in the affirmative, and urged that the appellate Court had found that the election in question did not meet the threshold in Articles 81 and 86 of the Constitution. He submitted that this election, just like all others, is a matter of great public interest, and hence there was an arguable appeal.

[14] Learned counsel urged that the appeal involved weighty matters of law and of constitutional application and interpretation, worthy of this Court's consideration. He signalled his intention to show that the Court of Appeal exceeded its jurisdiction by interfering with findings of fact by the High Court: on whether the applicant had been guilty of bribery, and on whether there were CDF officials who, being public officers, had campaigned for the applicant. By the appellate Court re-evaluating the evidence of the trial Court, he submitted, that Court exceeded its jurisdiction, contrary to Articles 87 and 105 of the Constitution, as read with Section 85A of the Elections Act. The applicant contended that the learned Judges erred by coming to findings of fact, and hence the entire decision became a nullity.

[15] Counsel further urged that in support of the arguability of the case, they would seek to show that, even if it were held that the Court of Appeal was right to weigh into issues of evidence, it was wrong in its interpretation of what amounts to bribery, and in its definition of "public officer." Counsel submitted that it would be for this Court to determine whether disbursements from the Constituency Development Fund (CDF), procedurally done, could count as bribes, by the terms of Section 64 of the Elections Act. This Court would also be invited to determine whether CDF Committee members were "public officers", in view of Article 260 of the Constitution, and Section 2 of the Public Officer Ethics Act (Cap 83, Laws of Kenya), in relation to the commission of the offence of political campaign by public officers contrary to Section 16 of the said Act.

[16] Counsel also raised issues concerning the "certificate and report" contemplated under Section 86 and 87 of the Elections Act, that were issued by the Court of Appeal. Was the Court of Appeal an "Election Court" capable of issuing this document? This would be a question of jurisdiction, as read with Article 164 of the Constitution - which this Court would be called upon to determine. Counsel intimated that it would be shown that the issuance of the said "certificate and report" contravened Article 50 (1) as

read with Article 25 of the Constitution, as well as Section 87 (2) of the Elections Act. This, in counsel's view, was an arguable point. Furthermore, counsel signalled that it would be demonstrated in the appeal that the appellate Court was wrong to issue a "certificate", when what was required under Section 87 of the Elections Act was a "report." This, he urged, would be shown in the appeal to have had a prejudicial effect, as it amounted to a "conviction without trial", contrary to the intent of the statute.

[17] On the issue of the appeal being rendered nugatory, it was the applicant's contention that the order for stay is necessary, as its absence would result in a by-election, whose effect would be the loss of the substratum of the appeal. The applicant referred to the decision in *Munya* (para. 92), where the Court stated that '*the main objective of the applicant is to forestall a situation where there is a possibility that his earlier election could be upheld by the Court...*'

[18] Counsel submitted that the consequences are very similar to the Court's finding in the *Munya* case, urging that in the event the applicant loses his parliamentary seat in the coming by-election, or in the event he wins the by-election, the appeal becomes a vain exercise. In either case, he contends, the applicant will have participated in an election which he ought not to have participated in, and which merely occasions wastage of public funds. He mused whether or not the Court would nullify the by-election results, in the event the applicant won in an appeal heard later in time. It was counsel's position that a lack of stay orders would probably render the entire appeal-process just a bare academic exercise.

[19] On the issue of public interest, the applicant urged the Court to consider the likely use of substantial amounts of public funds to carry out the by-election. He also asked the Court to take judicial notice of the disruptions occasioned to the public during political campaigns.

#### **(ii) The 1<sup>st</sup> Respondent**

[20] Learned counsel, Mr. Issa Mansour for the 1<sup>st</sup> respondent, in response, submitted that prayer 3 had been overtaken by events. He urged that although there had been a reference in the Court of Appeal's judgment to the "constitutional threshold of elections", this was not its main focus; it was instead focused on the offence of *bribery* (occupying paragraphs 18-42 of the 47-paragraph judgment). Thus, counsel urged, there were no questions of constitutional interpretation or application, that present themselves before this Court. It was counsel's contention that the Constitution in its application or interpretation, should not be invoked in this instance, for after all it was a norm of broad-based application, touching on virtually all contested matters. He contended that, Article 163 (4) (b) would have been the only proper recourse for the applicant, hence, the applicant ought to have sought leave first.

[21] In support of this contention, learned counsel, Mr. Odeny also for the 1<sup>st</sup> respondent, urged that the only issue of constitutional interpretation, that regarding the definition of public officer under Article 260 of the Constitution and Section 2 of the Public Officer Ethics Act, had already been settled by the trial Court. He submitted that the applicant had not cross-appealed against the findings of the trial Court, and that the Court of Appeal had not interfered with that finding. It was the 1<sup>st</sup> respondent's contention that since this element in the appeal had been abandoned by the applicant at the Court of Appeal, it could not now be 'resurrected' at the Supreme Court. Mr. Odeny also urged that the application was defective, as it was brought under Supreme Court Rule No. 21, instead of Rule Nos. 23 and 26. It was his contention that the jurisdiction of this Court had not been properly invoked. Counsel submitted that the requirement of compliance was not obviated by the general principle of Article 159(2) (d) of the Constitution which laid a premium on substantial justice.

[22] Counsel further submitted that, should the Court find that it has jurisdiction, it should not grant a

stay, as this appeal was not truly arguable. He contended that the points of law raised by the applicant came from a misunderstanding of the law. For example, the Court of Appeal was an “Election Court”, according to the respondent, by virtue of an amendment to Section 85 of the Elections Act and its non-appearance in the Act’s definitions section (s.2) flows from the fact of amendment itself.

[23] Learned counsel also submitted that the applicant had misapprehended the requirement of “certificate and report” of the “Election Court”; Section 76 of the Elections Act was about a certificate nullifying results, while Section 87 was concerned with a report on “any election offence committed.” He referred to the wording of the last paragraph of the report which he said, used the words, ‘*we hereby report*’, rather than ‘*certify*’; and he urged that this amounts to two documents in one. On the contention that there had been no fair hearing, in the terms of Article 50(1), counsel argued that the applicant having been a party all the way from the trial Court, was already afforded a fair hearing, and only a party not involved in the election petition was covered by the terms of Section 87 (2) of the Elections Act.

[24] Counsel submitted that the *Munya* case was distinct from the case at hand, since it was solely based on Article 81, and no inferences on fact were, in that case, involved. Relying on *Attorney-General v. Marakaru [1960] E.A.* counsel submitted that inferences drawn on the evidence regarding bribery, is a matter of law, and was within the ambit of appellate Court’s jurisdiction. Therefore, whether the Court was right or wrong, on such issues of law, did not entitle a party to come for a second appeal in the Supreme Court.

[25] Learned counsel, Mr. Odeny urged that the grant of stay was not in the public interest: because if it was granted, a person found to have committed an election offence will be left still discharging the functions of a public office.

[26] Lastly he urged that in the event it issues a stay order, the Court should find it fit to impose sufficient conditions for stay, such as the furnishing of security, as envisaged under the Civil Procedure Act (Cap. 21, Laws of Kenya) and the Court of Appeal rules.

### (iii) *The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents*

[27] Learned counsel, Mr. Mukele for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, in agreement with the applicant’s submission, urged that the Supreme Court should determine the jurisdiction of the appellate Court under Articles 87, 105 and 164 of the Constitution. He urged that the appellate Court’s conclusion had improperly been based on *fact*, rather than *law*.

[28] On the question whether or not DW8 and DW9 were public officers, counsel submitted that Section 2 of the Public Officer Ethics Act, and Article 260 of the Constitution, bear differing meanings; and that the appellate Court had attempted to expand the definition of “public officer” by relying on the Act but not the Constitution, erroneously.

[29] Learned counsel submitted that this Court ought to make a determination as to whether a finding can properly be made in respect of matters not forming part of the memorandum of appeal. He contended that *the appellate Court had delved into matters not rightfully before it, as shown by both the memorandum and the grounds of appeal.*

[30] On the question of the certificate and report issuing from Court, it was counsel’s submission that the same ought to be issued by the “Election Court”, as defined under Section 2 of the Elections Act, and not an appellate Court; and that these should be separate and distinct documents. *He however sought the Court’s guidance on this legal issue which had no precedent.*

[31] Counsel submitted that it was in the public interest that stay be granted.

(iv) ***The 4<sup>th</sup> Respondent***

[32] Counsel for the 4<sup>th</sup> respondent indicated that grant of stay orders would save them approximately KES 10 million that would be required for conducting party primaries. The party was funded by the Political Parties Fund, a public fund, and therefore, it would be in the public interest for a stay to be granted, to avoid possible waste of public funds.

**D. ISSUES FOR DETERMINATION**

[33] The following issues present themselves for determination by this Court:

- i. *does the Court have jurisdiction to hear the intended petition"*
- ii. *if yes, should the Court grant the interlocutory orders sought"*

**E. ANALYSIS**

***a. Jurisdiction of the Court***

[34] The Court has now had occasion to settle the question of its jurisdiction in election petitions, in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***, SC Application No. 5 of 2014. The Court in that case, observed that, *not every election petition decision is appealable* to the Supreme Court under Article 163 (4) (a) of the Constitution. As a basis of application of that Article, the issues decided in the Court of Appeal, and which are then brought up on further appeal, would have rested on *constitutional interpretation*. We would observe, in that context, that the Elections Act, and the Regulations thereunder, are normative derivatives of Articles 81 and 86 of the Constitution; and thus, in their interpretation, a Court of law will probably be intimately involved in the interpretation of the Constitution.

[35] Of the material issues before the appellate Court, the pertinent statement is found in para. 2 of the Judgment:

***"The 11 grounds of appeal in the appellant's memorandum of appeal raise two broad issues. The first issue covers the appellant's complaints that the learned judge erred in upholding the election which was conducted in violation of the Constitution and the law relating to that election. The second issue relates to the conduct of the trial of the petition. In this regard, the appellant faulted the learned Judge for being biased. The appellant complained that the learned Judge was '[biased outright] and selective in his appreciation of the evidence and legal authorities' cited [before] him."***

[36] The second issue was disposed of in paragraph 41 of the trial Court's judgment, on the basis that it had no foundation. It is the applicant's contention that the election was, therefore, nullified on the first ground - the election's *non-compliance with the Constitution*. The 1<sup>st</sup> respondent contests such a perception. He contends that the election was not annulled on any constitutional grounds, but on the Court's finding that the applicant had committed the *election-offence of bribery*. He contends that this

issue is precisely what occupied the minds of the Judges of the Court of Appeal, as shown in paragraphs 18-42 of their 47-paragraph Judgment. It is the 1<sup>st</sup> respondent's position that such was by no means a constitutional issue, as it squarely rested on Section 64 of the Elections Act – an ordinary statutory provision.

[37] In our perception, such an objection on the issue of jurisdiction is easily disposed of, by reviewing the Court of Appeal's conclusion as rendered in paragraph 43 of the Judgment:

***“For these reasons, we find that the conduct of the Nyando Parliamentary election in the 4<sup>th</sup> March, 2013 General Elections violated the Constitution of Kenya and other election law governing that election. Consequently we allow this appeal, and set aside the Judgment of Muchelule, J dated 30<sup>th</sup> September, 2013.”***

[38] It is clear to us, as it was clear to the Judges of the Court of Appeal, that the commission of an election offence, by vitiating the integrity of an election, goes to the heart of the question *whether an election was free and fair*, under Article 81 (e) of the Constitution. Thus, such a finding would engage this Court's jurisdiction to hear the appeal, under Article 163 (4) (a) of the Constitution.

#### ***b. Should Orders of Stay be granted***

[39] The second issue to be determined is whether there should be a stay of the by-election in Nyando Constituency pending the hearing and determination of this appeal. In the ***Munya*** case, the following three conditions were outlined, as a basis for granting stay orders in a case such as this one:

- (i) *the appeal or intended appeal is arguable and not frivolous;*
- (ii) *unless the order of stay sought is granted, the appeal or intended appeal, were it eventually to succeed, would be rendered nugatory;*
- (iii) *it is in the public interest that the order of stay be granted.*

We will, in this instance, take into account the three conditions.

#### ***(I) Whether the appeal is arguable and not frivolous***

[40] The applicant herein, with the support of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, sets out several issues for determination in his Petition of Appeal. These may be summarized as follows:

a. *whether the Court of Appeal exceeded its jurisdiction donated by Article 164 (3) of the Constitution and Section 85A of the Elections Act, by delving into issues of fact as opposed to issues of law;*

b. *whether the Court of Appeal erred in law in its definition of “public officer”, in view of Article 260 and Section 2 of the Public Officer Ethics Act;*

c. *whether the Court of Appeal erred in law in finding that public officers had campaigned for the applicant, contrary to Section 16 of the Public Officer Ethics Act;*

d. *whether the Court of Appeal erred in law in finding that the applicant was guilty of bribery under Section 64 of the Elections Act;*

e. *whether the Court of Appeal violated the applicant's constitutional rights to fair hearing, by issuing a certificate and report, pursuant to Sections 86 (1) and 87 (1) of the Elections Act, respectively; and*

f. *whether the Court of Appeal is an Election Court, capable of issuing the certificate and report pursuant to Sections 86 (1) and 87 (1) of the Elections Act, respectively.*

**[41]** It is clear to us that the jurisdictional question, which we have already determined, was an “arguable” one – as the parties had taken sharply contrasted standpoints. This was an issue eminently meriting resolution before this Court.

**[42]** The 1<sup>st</sup> respondent submitted that the definition of “public officer” had been settled by the High Court in its Judgment, and that the issue had not been contested in the Court of Appeal by the respondents herein; he urged that this issue could not be revived as a point of controversy before the Supreme Court.

**[43]** It is our observation, however, that the Judgment of the Court of Appeal invariably turned on the issue whether public officers had campaigned on behalf of the applicant herein, which in turn was based on the appellate Court’s acceptance of the definition adopted by the High Court. The fact that the appellate Court affirmed the definition by the High Court in its Judgment (paragraphs 30-32), makes it an issue that received consideration before both Courts, and therefore one meriting consideration before this Court. As to whether it is an arguable point, this appears to have been rightly conceded by the 1<sup>st</sup> respondent’s silence.

**[44]** As regards the fourth issue, the applicant urges this Court to consider whether the action of members of the Constituency Development Fund (CDF) Committee disbursing the Fund, through issuance of cheques, can rightly be described as bribery. Secondly, the applicant contends that although bribery was alleged, the chain was incomplete, in relation to the beneficiary of the “bribes.” The issue of law raised is whether bribery can be perpetrated in favour of an amorphous body, such as a crowd attending a rally, during a disbursement of CDF funds. Further, the applicant raises the question

whether political-campaign promises can be properly categorized as bribes. Insofar as such issues readily lend themselves to imprecise inferences but may occasion prejudice or benefit to a party in his or her rights, this Court perceives them as issues of law fit for canvassing in Court.

[45] Counsel for the applicant and 1<sup>st</sup> respondent gave differing views on whether the actions of the Court of Appeal, in issuing a certificate and report, infringed the applicant's rights under Article 50 (1) of the Constitution. Such a difference of opinion, on a matter clearly bearing on rights of parties, in our perception, signals that the issue is arguable.

[46] Learned counsel for the 1<sup>st</sup> respondent, Mr. Issa Mansur touched on the applicant's case in his argument about the role of the Court of Appeal as an "Election Court", in the context of the provisions of the Elections Act, and Articles 87 (1) and 105 of the Constitution. As the issue raised is destined to define the rights of parties, it is, in our perception, an arguable one.

[47] Our view of the several issues raised by the petition is that they are, *prima facie*, arguable; and it is equally clear to us that the relevant questions have constitutional underpinnings.

***(II) Would the Appeal be rendered nugatory, if Orders of Stay were not granted"***

[48] Just as in the *Munya* case, the appeal would be rendered nugatory if stay were not granted, but the appeal then proved successful, and the applicant either *won* or *lost* in the by-election. In either instance, the applicant would have been forced to go through the rigours of an election-campaign quite unnecessarily.

[49] Although it cannot be affirmed at this stage that the success of one or other of the grounds of appeal would result in an overturning of the Court of Appeal's decision, it is foreseeable that the applicant's success on some part of his petition could lead to an overturning of the decision, as regards the nullification of the election. Thus, it would be judicious to issue an Order of stay, to preserve the substratum of the appeal.

***(III) Is it in the Public Interest that Orders of Stay should be granted"***

[50] It is now well established that an Order of stay will issue in any case entailing the prospect of an electoral exercise the outcome of which **may** be immaterial, or void in law. Learned counsel for the 4<sup>th</sup> respondent has, besides, indicated to the Court that the procedure of party-nomination for the by-election would cost approximately 10 million Kenya Shillings, drawn from the Political Parties Fund – a public facility. The public interest coincides with the constitutional principle that public money shall be used prudently. A by-election process conducted in parallel with the hearing and determination of this appeal, in our perception, falls foul of the public interest.

[51] The 1<sup>st</sup> respondent asked that, in view of the costs awarded to him by the Court of Appeal, an order of stay, if granted, should be accompanied by an order for security for costs. While anxiously advertent to this prayer, we would be guided by the basic law of costs: costs follow the event. We would lay a premium on the public-interest aspect of the instant matter, over and above the individual private interest in the form of costs previously ordered to be paid.

**F. DETERMINATIONS AND ORDERS**

[52] Upon considering the relevant issues at this interlocutory stage, we find it judicious to make certain determinations and Orders as follows:

- (a) *The applicant's appeal properly falls within the Supreme Court's jurisdiction.*
- (b) *The appeal falls within the proper criteria for hearing before the Supreme Court.*
- (c) *Consequently, the appeal file shall be placed before the Registrar who shall allocate the earliest available dates for a hearing before a full Bench.*
- (d) *The appeal file shall be placed before the Honourable the Chief Justice and President of the Court, for the empanelling of a full Bench.*
- (e) *A conservatory Order is hereby issued against the Speaker of the National Assembly or any other person, issuing a writ to the 2<sup>nd</sup> respondent regarding the conduct of fresh election, pending the hearing and determination of the appeal.*
- (f) *Any writ or instrument such as may be in existence and that is prejudicial to the terms of the foregoing Order, is declared null.*
- (g) *A conservatory Order is hereby issued against the 2<sup>nd</sup> respondent announcing and/or conducting elections for Nyando Constituency, pending the hearing and determination of the appeal.*
- (h) *The costs of, and incidental to the instant application shall abide this Court's Judgment and final Orders.*

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> Day of May, 2014.**

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**J. B. OJWANG**

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT  
COURT**

**JUSTICE OF THE SUPREME**

**I certify that this is a true copy of the original**

**REGISTRAR, SUPREME COURT**



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